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In The
Supreme Court of the United States

October Term, 1982

STATE OF NEVADA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PETITIONER

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT AND THE SALT RIVER VALLEY WATER USERS' ASSOCIATION IN SUPPORT OF THE TRUCKEE-CARSON IRRIGATION DISTRICT AND THE STATE OF NEVADA

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INTERESTS OF AMICI CURIAE

The Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona organized pursuant to Ariz. Rev. Stat. Anno. §§ 45-901 *et seq.* The Salt River Valley Water Users' Association is a private corporation originally organized under the laws of the Territory of Arizona. By virtue of various contracts, these amici curiae[1] operate the Salt River Project, a federal reclamation project authorized and constructed under the authority of the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq.* The Salt River Project facilities impound the waters of the Salt and Verde Rivers for storage and delivery to agricultural, municipal and industrial water users in the Salt River Valley of central Arizona where over half the population of Arizona resides (the Phoenix area).

The entire flow of the Salt and Verde Rivers is appropriated to specific lands, lying mostly in the Salt River Valley; and the rights of individual landowners to beneficially use the waters on the lands within the exterior boundaries of the Salt River Project were confirmed in a decree entered by Judge Kent of the Arizona Territorial Court on March 1, 1910, in the case of *Hurley v. Abbott*, No. 4564.[2] The United States was a party to the territorial decree in a representative capacity for various Indian tribes and other federal interests, but not those of the Salt River Project. The Salt River Project is responsible for the administration of the rights to the Salt and Verde River waters as provided for in the decree.

The Salt River Project may be affected by this Court's decision because this case involves the preclusive effect of a judgment entered in an action in which the United States was a party in a representative capacity for an Indian tribe.

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[1] This brief is filed with the consent of all parties of record pursuant to Rule 36.

[2] Reference was made to this decree in Judge Schroeder's dissenting opinion below, 649 F.2d at 1314 n.1, and in the Brief for the United States in Opposition to the Petitions for a Writ of Certiorari at 23.

The interests of the Salt River Project, the water users it serves, and the people of central Arizona are in the affirmance of that portion of the Ninth Circuit's judgment giving preclusive effect to the *Orr Ditch* decree as to most of the parties, and in the reversal of that portion of its judgment which fails to give the same preclusive effect as to the Truckee-Carson Irrigation District.

ARGUMENT

I.
PREFACE

The enormous twentieth century development of the western part of the United States has been based upon the certainty of adequate water supplies in an otherwise water-scarce part of the North American continent. The United States, through its congressionally created water policies, its territorial and federal courts, and its representation of its many interests in stream adjudications, has played a major role in the civilization and prosperity of the west. This case involves an attempt by an Indian tribe and its somewhat reluctant trustee to upset this well-ordered society. Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles. The Pyramid Lake Paiute Tribe seeks to do that here. Its fanciful abstractions must not be permitted to overcome the legitimate and long standing reality of adjudicated water rights. It is no exaggeration to state that should the Tribe's view prevail, those living in areas such as Phoenix should consider plans to return to the east from which their historical antecedents came.

This case strikes us as a pitiful example of form over substance. As though splitting hair, the Tribe first argues that its claim for a greater quantity of water, based upon a newly alleged separate purpose for which the reservation was created, is a different claim from that adjudicated in the prior *Orr Ditch* proceeding, and that if it is not, it has been denied due process. We first show that the Tribe is

not permitted to adjudicate its water right in a piecemeal fashion based upon its statement of a new and separate purpose. We then show that its due process claim is an illusion. Therefore, that part of the judgment of the United States Court of Appeals for the Ninth Circuit giving preclusive effect to the prior decree is correct.

We next show that that portion of the judgment below which refuses to attribute preclusive effect to the prior decree as to the Truckee-Carson Irrigation District is wrong as a matter of law and would, if affirmed by this Court, subvert the whole concept of federal representation of all its interests in a single proceeding.

II.

A. THERE IS BUT ONE CLAIM TO A FEDERAL RESERVED WATER RIGHT REGARDLESS OF THE NUMBER OF PURPOSES ALLEGED

It is undisputed that when the United States represents tribal interests in an action as trustee, any judgment entered binds the tribe under the doctrine of res judicata. *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 434-35 (1912); *Restatement (Second) of Judgments* § 41 (1982). The dominant issue in this case is not whether the Tribe is bound by a prior decree but whether the claim it asserts here has merged into the decree to which it is bound. We first show that claimants to federal reserved water rights have but one cause of action or claim. That water may be used for more than one purpose does not change the result. Different purposes, to the extent that they are legitimate, merely affect the quantum of water, not the existence of the right in the first instance. Plainly, multiple purposes go to the issue of damages, not liability. Thus, when a claimant litigates its federal reserved water right, it is bound to assert in one action its full entitlement. Otherwise, a claimant could seek to adjudicate its federal reserved water right in as many proceedings as it alleges purposes exist. For example, this would permit a tribe to adjudicate rights to water for agricultural purposes in 1910, timber purposes in 1920,

recreational purposes in 1930, aesthetic purposes in 1940, industrial purposes in 1950, municipal purposes in 1960, domestic purposes in 1970, *ad infinitum* for as many purposes as the tribe alleges exist. While we do not concede that multiple purposes exist in this case,[3] to the extent they do, they relate to one right to federal reserved waters. If we are incorrect, no judicial proceeding to adjudicate a tribe's federal reserved water right would ever be final. Without finality, water decrees are useless, and without the certainty of decreed water rights, civilized life in the west as we know it could not exist.

That a claimant owns but one cause of action or claim for a federal reserved water right, regardless of the number of purposes served by that right, is demonstrated by the application of any of the known tests suggested for the

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[3] In the case before this Court, the district court found that "the primary purpose for the creation of this Paiute Reservation was in furtherance of the then existing national governmental policy of setting apart the various Indian tribes of the West on reservations on the public domain, conforming as nearly as possible to their historic areas of occupancy". Pet. App. A-97. In contrast the court found "[t]hat with respect to this tribe there were several apparent *subsidiary* purposes for the creation of the reservation reflected in historic documents". *Id.* (emphasis added). Among these apparent subsidiary purposes, was "to provide the Indians with access to Pyramid Lake and at least the lower reaches of the Truckee River in order that they might obtain their sustenance, at least in part, from these historic fisheries". *Id.* at A-98. *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012 (1978), held that a federal reserved water right arises only when the water is necessary to fulfill the very purpose for which a reservation is created, but where water is only valuable for a secondary use of the reservation, no federal reserved right arises. 98 S.Ct. at 3015. A federal reserved right to water arises only when without the water the primary purpose of the reservation would be entirely defeated. 98 S.Ct. at 3014. Yet not even the Tribe or the United States in this case suggest that without the fishery the Pyramid Lake Paiute Reservation would cease to have a purposeful existence. Indeed, the reservation has existed since its inception without a reserved right for fishery purposes. And it is clear that with its already decreed rights to federal reserved waters the reservation can continue to exist as a place set apart for the members of the Tribe, thereby fulfilling the primary purpose for its creation.

determination of what constitutes a cause of action or claim for purposes of res judicata.

The most recent statement of the dimensions of a claim or cause of action for purposes of res judicata is that of the *Restatement (Second) of Judgments* § 24 (1982) which states the rule against splitting a claim as follows:

> § 24. Dimensions of "Claim" for Purposes of Merger of Bar-General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Under this test, a claim to a federal reserved water right for fishery purposes is extinguished by a judgment adjudicating a federal reserved water right for any other purpose since the alleged water right for fishery purposes is part of the transaction or series of connected transactions out of which the first action arose. Under subparagraph (2) of § 24, the existence of a transaction is to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether unitary treatment conforms to the parties' expectations or business understanding or usage. Obviously, claims for a federal reserved water right for fishery purposes and any other purpose are related in time, space, origin or moti-

vation. If they exist at all, they were created at the same time, they involve the same water source, and they have as their origin the same federal reserving document establishing the reservation. In addition, they form a convenient trial unit since they involve the same proof except for the different purpose. It would strain credulity to suggest that it would be more convenient to litigate separate purposes in separate actions. Finally, unitary treatment certainly conforms to the expectations of parties to general stream adjudications since general stream adjudications have as their purpose the resolution of all competing claims to a common water source at the same time.

Our application of § 24 to the facts of this case is supported by §§ 25 and 26. Section 25 provides that § 24 applies to extinguish a claim even though the claimant is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action or seeks remedies not demanded in the first action. And, § 26, which provides exceptions to the general rule against splitting, contains none which would have any application to this case. Thus, to the extent that the *Restatement (Second) of Judgments* (1982) constitutes the most recent and distinguished statement of the relevant law, it points solely in the direction of claim preclusion in this case.

The Tribe does not dispute that contemporary law precludes its claim to additional water based upon an alleged fishery purpose, but argues that it is unfair to apply new standards to claims litigated before these standards were promulgated. Cross-Petition for Writ of Certiorari at 16.

But the same conclusion is reached by reference to then existing law. Consider the Tribe's reliance on § 61 of the original *Restatement of Judgments* (1942). Comment a to § 61, at 240-41, illustrates the operation of § 61, on the one hand, with §§ 62-67, on the other. Under § 61, if the evidence needed to sustain the second action would have sustained the first action, the second action is precluded.

But even if the evidence needed to sustain the second action would not have sustained the first action, the second action is still precluded under §§ 62-67. Under § 62, a party may not split a cause of action even where the second action purports to litigate a part of the action which was not litigated in the original action. Comment e to § 62, at 247, illustrates the application of this principle. Where one act causes a number of harms or invades a number of different interests of the same person, a judgment based upon the act normally prevents him from maintaining another action for one of the harms although no claim for it was made in the first proceeding. So, for example, a judgment in an action for personal injuries precludes a second action for property damage. Illustrations 7 and 8 at 248.

Hence, an application of the original § 62 of the *Restatement of Judgments* (1942) produces the same result as does the application of the *Restatement (Second) of Judgments* § 24 (1982). For the one act of the defendants was use of water. The plaintiffs allege different harms: the invasion of plaintiffs' interests in water for agricultural purposes and an invasion of plaintiffs' interests in water for fishery purposes. Under § 62 these claims cannot be split, and a second action is precluded by a judgment in the first.

Other tests suggested for the determination of what constitutes a cause of action produce the same result. Among those suggested by Professor Moore are:

> [W]hether the same right is infringed by the same wrong; whether 'there is such a measure of identity that a different judgment in the second [action] would destroy or impair rights or interests established by the first' judgment; identity of grounds; whether the same evidence would suffice to sustain both judgments. 1B *Moore's Federal Practice* ¶0.410[1], at 1158 (1980).

Briefly treating these seriatim, it is obvious that, to the extent applicable in a water adjudication proceeding, the following results prevail. The defendants' use of water in the second action is the same as the defendants' use of wa-

ter in the first action. Similarly, the plaintiffs' right to federal reserved water in the first action is the same as the plaintiffs' right to federal reserved water in the second action. A different judgment in this action would destroy or impair rights or interests established by the first judgment, for, if the plaintiffs establish greater federal reserved rights than those adjudicated in the first action, defendants' rights established in the first action are necessarily diminished. The ground for the assertion of a federal reserved water right for fishery purposes is identical to the ground asserted for a federal reserved water right for agricultural purposes—the federal reserved water rights doctrine. The evidence would be identical except for the single issue of purpose, but under former § 62, this alone is not enough to avoid claim preclusion.

Thus the Tribe's argument based upon unfairness is just another fantasy. The application of any known rule, old or new, yields one result: claim preclusion.

B. THE TRIBE'S DUE PROCESS ATTACK IS A FAULTY ASSAULT ON ALL REPRESENTATIVE LITIGATION.

By its Cross-Petition, the Tribe also attacks that part of the decision below which upholds representative litigation against its due process claim. We now show that the Tribe's argument misperceives the proper interplay between due process and res judicata and that the Court of Appeals was correct when it held that claim preclusion in this case did not violate due process.

The Tribe argues that the court below erred when it focused on the defendants' actual knowledge of the government's improprieties rather than whether the Tribe received notice and an opportunity to be heard. The Tribe further argues that the *Restatement (Second) of Judgments* does not purport to implement due process

guarantees. The Tribe is wrong about the *Restatement's* appreciation for due process, and its cry for notice and an opportunity to be heard is an assault on all representative litigation.

On January 11, 1982, the American Law Institute promulgated the *Restatement (Second) of Judgments*. Its introduction makes clear that the Institute's distinguished reporters and advisors were keenly aware of the relationship between due process and res judicata.

> [A] procedure for ventilating a legal dispute that lacks certain minimal elements of form will be treated as inconclusive for the reason that it is fundamentally unfair. Putting the point differently, it may be a denial of Due Process to treat an undefined procedural mechanism as yielding a conclusive result in determination of legal rights.
>
> The requirements of Due Process prescribe the outer constitutional limits of a procedural system that may yield a conclusive product, i.e., one entitled to res judicata effects. Within the constitutional limits, the contours of res judicata are determined by the particulars of the opportunity to litigate afforded by the system of procedure in question. The imprint of the procedural system manifests itself in the rules of both claim preclusion and issue preclusion. *Restatement (Second) of Judgments* at 7 (1982).

Thus, the provisions of the *Restatement (Second) of Judgments* have been promulgated on the basis that they do in fact comport with due process. The Tribe is plainly wrong when it suggests that the *Restatement* "does not purport to define or implement the procedural due process guarantees of the Fifth or Fourteenth Amendments." Cross-Petition for Writ of Certiorari at 13.

As to the merits, the Tribe attackes the Court of Appeals' adoption of the *Restatement (Second) of Judgments* § 42.[4] But a simple analysis of § 41 and 42 of the *Restatement (Second) of Judgments* (1982) shows the hollowness of the Tribe's due process claim. Section 41 states that a person who is not a party to an action but who is represented by a party is bound by a judgment as though he were a party and that a person is represented by a party who is a trustee of an interest of which the person is a beneficiary, or is invested with authority to represent him in an action, or is the guardian or similiar fiduciary of an interest of which the person is a beneficiary, or is an official or agency invested by law with authority to represent the person's interest. It goes without saying that the United States meets all these standards vis-a-vis the Tribe. It is the trustee of the Tribe's interest in water. It has been invested by the Tribe with authority to represent it in litigation. It is the guardian and fiduciary of the Tribe's interest in water. And it has been invested by federal common and statutory law with the authority to represent the Tribe's interest. This Court recognized these principles long before the promulgation of § 41. *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424 (1912). It is thus too late for the Tribe now to argue that it, rather than the United States, had to receive notice that its rights were at issue and that it, rather than the United States, had to have a full and fair opportunity to be heard. In short, the Tribe is attacking all representative litigation and asks this Court to overrule *Heckman*. Assuming this Court is not inclined to overrule *Heckman*, the focus of analysis shifts from § 41 to § 42 which provides exceptions to the general rule of representation. The facts of this case do not warrant the application of any of the exceptions of § 42. The only exception arguably related to this case is that contained in § 42(1)(e) [[t]he representative

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[4] Both the Tribe and the Court of Appeals referred to § 86, which appeared in a tentative draft of the *Restatement (Second) of Judgments*. § 86 has been incorporated into § 42 of the final promulgation.

failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent]. The Court of Appeals found that the *Orr Ditch* defendants were entitled to rely on the final decree because if there were any improprieties (and the Court of Appeals assumed, but did not decide, that there were) they were unknown to the defendants. The Tribe's argument that § 42(1)(e) "does not purport to define or implement . . . procedural due process" because that section governs relationships between private representatives and their beneficiaries is plainly wrong. In the first place, beneficiaries with private trustees are entitled to no less due process than beneficiaries with public trustees. For it is not the public nature of the trustee that counts, but rather the public nature of the judicial system which must accord the parties due process. Secondly, § 42(1)(e) does purport to apply to public representatives since the general rule of § 41 specifically alludes to official trustees.

Even as the Tribe eschews § 42(1)(e) it seeks to rely upon § 42(1)(d) but § 42(1)(d) on its face applies to class actions and *Orr Ditch* was not a class action. Comment f to § 42 illuminates the analysis: "[t]he failure of a representative to invoke all possible legal theories or to develop all possible resources of proof does not make his representation legally ineffective, any more than such circumstances overcome the binding effect of a judgment on a party himself". The whole purpose of representative litigation would be defeated were the Tribe's view to prevail. Professor Wright has stated that "[i]f a price must be paid for inept representation, it is better that at least in this situation it should be paid by personal liability of the representative rather than by denying proclusion to his adversary". 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4454 at 471 (1981). There is no evidence in this case of

inept government representation, but if there were, the Tribe's claim is against the United States, not its adversaries in this proceeding.

III.

THE PRIOR DECREE HAS PRECLUSIVE EFFECT AS TO THE TRUCKEE-CARSON IRRIGATION DISTRICT AS WELL

Having opposed the claims expressed in the Tribe's Cross-Petition and having expressed our support for the resolution of those claims by the Court of Appeals, we now turn our attention to that portion of the opinion below which denies preclusive effect solely as to the Truckee-Carson Irrigation District. Here we break ranks with the Court of Appeals and support the dissenting views of Judge Schroeder and the Petitions filed by the Truckee-Carson Irrigation District and the State of Nevada.

The error made by the Court of Appeals on this issue flows from its erroneous assumption that the rule against preclusion as to co-parties who are not adverse under the pleadings has some applicability to this case. We find this assumption remarkable since even the Court of Appeals admitted that the Tribe and the Truckee-Carson Irrigation District were not co-parties but, rather, each of their interests were represented by the United States. Thus it is not the *Restatement (Second) of Judgments* § 38 (1982),[5] that is applicable but, rather, §§ 41 and 42 discussed above in part II. Sections 41 and 42 deal with representative litigation, such as exists here, while § 38 deals with co-parties, a condition which does not exist here by the Tribe's own admission. Thus the whole notion of adversity under the pleadings is an inappropriate part of the court's analysis.

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[5] The court referred to tentative draft § 82, now denominated as § 38.

Framed properly in terms of representative litigation the problem is more simple. The United States, because of its vast holdings in various proprietary capacities, because of its ownership and control of federal reclamation projects, and because of its role as trustee for Indian tribes, of necessity will always represent interests adverse to each other in connection with the adjudication of water rights. We know of no instance in which the United States has presented but one of its interests in such a proceeding. Indeed it cannot for it will jeopardize its other interests. The court below suggested that by representing the interests of both an Indian tribe and a federal reclamation project simultaneously it compromised its duty to the Tribe. If that is so, it also compromised its duty to the Truckee-Carson Irrigation District. The underlying reality of the record in this case suggests that all interests, including those of the Tribe and the Truckee-Carson Irrigation District, were aware of the competitive nature of the respective interests but did not object because the government did not *in fact* compromise its duty to either the Tribe or the Truckee-Carson Irrigation District. The Court of Appeals attempts to set up a *per se* prohibition against federal representation of both when the facts of this case suggest that no real breach of the government's duty occurred. Thus, the Court of Appeals permits the abstract possibility of breach to prevail over the underlying reality of nonbreach. This, we suggest, is the exact opposite of proper adjudication. The facts of this case should determine the outcome, not *a priori* model rules which have no application to the facts.

The hollowness of this part of the opinion of the Court of Appeals is illustrated by its suggestion that the government was aware of the practice of filing cross bills to set up adversity between co-parties. But since neither the Tribe nor the Truckee-Carson Irrigation District were co-parties, the United States would never have filed cross bills as between them. This brings us right back to the fundamental question of federal representation of multiple interests. We suggest that these problems are to be resolved in accord-

ance with the *Restatement (Second) of Judgments* §§ 41 and 42 and, under that analysis, claim preclusion should apply as to the Truckee-Carson Irrigation District for the same reasons it should apply to the parties to the case.

The Court of Appeals compounds its error by finding that the fishery claim asserted here was not actually or necessarily litigated in *Orr Ditch*. This is in flat contradiction to its earlier finding that a delineation of separate purposes does not create separate claims. Thus, even if strict adversity were required, which it was not, the federal reserved water right of the Tribe was actually litigated and it is thus now precluded from asserting a claim to a greater quantity of water based upon separate purposes.

IV.
CONCLUSION

The doctrine of res judicata serves the salutary purpose of bringing certainty to rights through the adjudicatory process. Without finality, adjudication would be void of utility and meaning. If the Tribe's view of res judicata prevails, then every water adjudication that has occurred is meaningless. This would be true of not only those in which the United States represented a tribe in a representative capacity but any water adjudication proceeding which resulted in a decree. For if a party is not required to assert all the grounds and purposes under which a claim to water is asserted in the source which is the subject of the proceeding, then no decree will have finality.

Water adjudications are among the lengthiest and most complex proceedings in existence. Their purpose is to resolve the claims of competing users with the finality upon which all future uses are based. The Tribe's view of res judicata would jeopardize the water rights of all those who are living under existing decrees. This is especially frightening where, as in central Arizona, water is fully appropriated. This Court was sensitive to this issue when it stated that because federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water avail-

able for water-needy state and private appropriators, this reality "must be weighed in determining what, if any, water Congress reserved for use". *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 3016-17 (1978).

If the Tribe prevails, then the case before this Court, like the prior action, will not be entitled to finality. The Tribe's abstractions must not persuade this Court to eviscerate the doctrine of res judicata where it is needed most.

That portion of the judgment of the United States Court of Appeals for the Ninth Circuit giving preclusive effect to the *Orr Ditch* decree as to all but the Truckee-Carson Irrigation District should be affirmed, while that portion of its judgment which fails to attribute that same preclusive effect as to the Truckee-Carson Irrigation District should be reversed.

Respectfully submitted,

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